ACLU of Virginia

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To: Supreme Court of Virginia
From: Rebecca K. Glenberg
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RE: Comments on Proposed Rule 3A:14.1, Confidentiality of Juror Personal Information

Summary

The ACLU of Virginia opposes proposed Rule 3A:14.1, making all jurors anonymous in all criminal trials, as an infringement on the right of the public to access criminal trials and a threat to presumption of an open criminal justice system. The U.S. Supreme Court has recognized a First Amendment right of access to criminal trials and jury selection, and the Fourth Circuit Court of Appeals has held that the public has a right to know the names and addresses of jurors. If Rule 3A:14.1 is adopted, the ACLU of Virginia is prepared to mount a legal challenge to its constitutionality.

Background

In 2008, the General Assembly and Governor enacted Virginia Code Section 19.2-263.3, allowing a court, upon good cause shown, to prohibit the disclosure of personal information about jurors to anyone other than counsel. Good cause includes situations in which there is a likelihood of bribery, tampering, injury or harassment to a juror. The statute further directs the Virginia Supreme Court to publish rules "that provide for the protection of the personal information of a juror in a criminal trial."

Pursuant to this legislation, the Advisory Committee on Rules of the Court of the Virginia Supreme Court has proposed Rule 3A:14.1. The proposed rule requires that every juror be assigned a number, and be referred to by number, rather than name, at all stages of the proceedings. Further, identifying information provided to counsel may be shared only with the client, co-counsel, and jury selection consultants. After the jury is impaneled, all copies of this information must be returned to the court and kept under seal. In essence, the rules mandate that juror identities be kept secret in every criminal trial.

Proposed Rule 3A:14.1 is Unconstitutional

The U.S. Supreme Court has recognized a First Amendment right of access to criminal trials and jury selection. In *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980), the Court affirmed the public's right to attend to criminal trials, absent specific findings by the court of some overriding interest. In *Press Enterprise Co. v. Superior Court (Press Enterprise I)*, 464 U.S. 501 (1984), the Court held that this right of access extends to the jury selection process.

Although the U.S. Supreme Court has not specifically addressed juror anonymity, these two cases underpin lower court rulings holding that juror anonymity violates the first

amendment. Of particular importance to Virginia is *In re Baltimore Sun Co.*, 841 F.2d 74 (4th Cir. 1988), in which the Fourth Circuit held that the names and addresses of jurors are "as much a part of the public record as any other part of the case," 481 F.2d at 75. The court pointed out that in the early days of the jury system, "everybody knew everybody on the jury," and that this is still the case in many rural communities. *Id.* Requiring the court to make jurors' names and addresses public was thus "no more than an application of what has always been the law." *Id.*

As the Fourth Circuit observed, the public availability of jurors' names and addresses is a crucial part of our tradition of open criminal proceedings. "[W]e think the risk of loss of confidence of the public in the judicial process is too great to permit a criminal defendant to be tried by a jury whose members may maintain anonymity." *Id.* Accordingly, the court ruled that the names and addresses of jurors must be made public. Other courts of appeal have reached similar conclusions. *See In re Globe Newspaper Co.*, 920 F.2d 88 (1st Cir. 1990); *U.S. v. Antar*, 38 F.3d 1348 (3rd Cir. 1994).

These decisions demonstrate that the presumption must always be in favor of keeping the identities of jurors open, and that exceptions must be supported by particularized findings of need. A rule imposing a blanket secrecy requirement in all criminal trials cannot withstand constitutional scrutiny.

Proposed Rule 3A:14.1 is Exceeds the Legislative Mandate

Read in isolation, Paragraph B of the new Virginia Code Section 19.263.3 appears to give the Virginia Supreme Court unbounded authority to enact "rules that provide for the protection of the personal information of a juror in a criminal trial." But, as the Court has repeatedly held, statutory interpretation requires one to "look to the whole body of a statute to determine the true intention of each part." *Oraee v. Breeding*, 270 Va. 488, 498, 621 S.E.2d 48, 52 (2005) (quoting *McDaniel v. Commonwealth*, 199 Va. 287, 292, 99 S.E.2d 623, 627 (1957)). "A statute should be read and considered as a whole, and the language of a statute should be examined in its entirety to determine the intent of the General Assembly from the words contained in the statute." *Id.* at 498, 53 (quoting *Department of Medical Assistance Servs. v. Beverly Healthcare of Fredericksburg*, 268 Va. 278, 285, 601 S.E.2d 604, 607-08 (2004)). "In doing so, the various parts of the statute should be harmonized so that, if practicable, each is given a sensible and intelligent effect." *Id.* (quoting *Colchester Towne Condominium Council of Co-Owners v. Wachovia Bank, N.A.*, 266 Va. 46, 51, 581 S.E.2d 201, 203 (2003)).

In this case, Section 19.2-263(A) provides that courts may regulate the disclosure of juror information only upon good cause shown. But the proposed rule requires secrecy in every case. The proposed rule thus renders Paragraph A of the statute meaningless. If juror identities must always be confidential, there is little point to requiring a court to make findings of good cause in order to regulate that information. Reading the statute as a whole, the General Assembly cannot have intended for the Virginia Supreme Court to enact rules that would nullify another section of the statute.

Conclusion

The proposed rule violates the First Amendment and is inconsistent with Section 19.2-263. Should the rule be enacted, the ACLU of Virginia is prepared to challenge it on behalf of an appropriate party.